

SETTLEMENT AND PROJECT CLOSEOUT AGREEMENT

Parties

This Settlement and Project Closeout Agreement (this "Agreement") is entered into by and between the City of Newport, Oregon (the "City") and Clackamas Construction, Inc. ("Clackamas"). The City and Clackamas may sometimes be individually referred to herein as a "Settling Party," and collectively referred to herein as the "Settling Parties."

Recitals

WHEREAS, the City and Clackamas entered into a written prime contract (the "Contract") for the construction of the N.E. 7th Street Pump Station in Newport, Oregon (the "Project").

WHEREAS, Clackamas believes it performed extra work at the Project, in excess of the work contemplated by the Contract and the Project's plans and specifications, which entitle it to an increase in Contract price, and an extension of Contract time.

WHEREAS, Clackamas submitted change order requests to the City for an increase in Contract price and an increase in Contract time to account for the alleged extra work.

WHEREAS, the City disputes that Clackamas is entitled to an increase in Contract time and/or an increase in Contract price for much of the alleged extra work, and the City disputes the quantum of increase where a change in either Contract time or Contract price is warranted.

WHEREAS, in the absence of an increase to the time for Contract performance, Clackamas was responsible for achieving substantial completion of the Project by December 15, 2017, subject to liquidated damages at \$850/day. Substantial completion was achieved on March 22, 2018.

WHEREAS, in the absence of an increase to the time for Contract performance, Clackamas was responsible for achieving final completion of the Project by March 27, 2017, subject to liquidated damages at \$550/day. Final completion was achieved on May 17, 2018.

NOW, THEREFORE, in consideration of the above recitals and the promises contained in this Agreement, the execution of this Agreement, and other and further valuable consideration of which is hereby acknowledged, the Settling Parties agree to settle the disputes between them and to close out the Project as more specifically set forth herein.

Agreement

1. **Incorporation.** All of the preceding paragraphs are incorporated into this Agreement as though fully set forth herein.

2. **Consideration.** The Settling Parties agree that the following shall be the consideration for this Agreement:

- 2.1 Payment in the amount of seventy thousand dollars (\$70,000) will be made by the City to Clackamas within 30 calendar days of Clackamas's execution to this Agreement.
- 2.2 The Settling Parties waive and release their respective claims, as more specifically set forth in this Agreement.

3. **Mutual General Release.** Except as otherwise provided in this Agreement, the Settling Parties hereby release, waive and discharge any and all claims, or causes of action of any kind whatsoever, whether sounding in tort, contract, equity, or otherwise, whether known or unknown, and for any damages arising therefrom, whether known or unknown, including, but not limited to, contractual damages, consequential damages, property damages, lost profits, and attorney's fees, the Settling Parties had, have or may have against the other, arising out of or relating to the Project or the disputes described in the Recitals above (all of which shall be collectively referred to as the "Released Claims"). Notwithstanding the foregoing, warranty claims under the Contract are expressly excluded from the Released Claims.

4. **No Future Work by Clackamas.** Clackamas agrees to forgo bidding on any future public work, public contract, or public improvement with the City as contracting agency.

5. **Assignment.** Clackamas represents and warrants that it has not previously sold, assigned, transferred, conveyed, hypothecated or otherwise disposed of any claim, demand, cause of action, obligation, damage or liability, which is the subject of this Agreement, whether known or unknown.

6. **Attorneys' Fees and Costs.** Clackamas, on the one hand, and the City, on the other hand, shall bear any and all attorneys' fees, expenses and costs incurred in connection with the Released Claims and the drafting and negotiation of this Agreement.

7. **Prevailing Party.** In the event of a dispute regarding any term or condition contained within this Agreement, or if any Settling Party is required to bring an action to enforce a payment obligation under this Agreement, the prevailing party shall be entitled to recover all reasonable attorneys' fees and costs.

8. **Agreement as Defense.** Each of the Settling Parties agrees that this Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or proceeding which may be instituted, prosecuted or attempted in breach of this Agreement.

9. **No Undue Influence.** Each of the Settling Parties acknowledges and represents that it performed an independent investigation of the underlying facts and the Released Claims, including, but not limited to, any unknown claims, and entered into this Agreement without fraud, duress, or undue influence.

10. **No Third-Party Rights.** Nothing in this Agreement shall be deemed to create any rights in favor of, or to inure to the benefit of, any person who, or entity which, is not expressly named as a party to this Agreement. Nothing in this Agreement shall be deemed to waive or release any right, claim, demand, damage, defense, right of action or cause of action of any kind whatsoever against any person who, or entity which, is not expressly named as a party to this Agreement.

11. **No Admission.** This Agreement pertains to disputed claims, and is the result of compromise. As such, it does not constitute and shall not be deemed as an admission of liability by any of the Settling Parties.

12. **Good Faith.** Each of the Settling Parties acknowledges and agrees that the settlement contemplated by this Agreement is made in good faith and is the result of arms-length negotiations between the Settling Parties hereto following investigation and discovery.

13. **Applicable Law.** This Agreement is made and entered into in the State of Oregon and shall in all respects be interpreted, enforced, and governed under the laws of the State of Oregon.

14. **Binding on Successors.** With the exception of paragraph 4 above with the heading, "No Future Work by Clackamas," the provisions of this Agreement shall be deemed to obligate, extend to, inure to, and be binding on each of the Settling Parties and their respective successors and/or assigns. Paragraph 5 above shall obligate, extend to, inure to, and be binding on any successors, if the successor entity, or the successor entity's owner or owners are presently associated, in any way, with Clackamas or any of Clackamas's current employees or owners.

15. **Captions.** The captions by which the sections and subsections of this Agreement are identified are for convenience only and shall have no effect whatsoever upon its interpretation.

16. **Severance.** If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision shall be deemed to be severed and deleted; and neither such provision, nor its severance and deletion, shall affect the validity of the remaining provisions.

17. **No Reliance.** Each of the Settling Parties acknowledges and represents that it has freely and voluntarily entered into this Agreement, and that in doing so, it did not rely on any inducement, promise, representation, agreement, arrangement, understanding, or warranty other than as expressly set forth in this Agreement.

18. **Consulted with an Attorney.** Each of the Settling Parties acknowledges and represents that prior to the execution of this Agreement it consulted with its attorney in order that it may intelligently exercise its own judgment in deciding whether to execute this Agreement.

19. **Time of the Essence.** Time is expressly declared to be of the essence in connection with regards to the Settling Parties' obligations as set forth above.

20. **Execution.** For the purposes of facilitating payment as set forth herein, the Settling Parties agree that facsimile or PDFs of their respective executed signature pages shall be fully enforceable as if they were an original, "blue ink," executed signature page.

21. **Modifications.** This Agreement may not be modified or amended except by a written instrument executed by each of the Settling Parties.

22. **Neutral Construction.** This Agreement is the product of negotiation among the Settling Parties, and represents the jointly conceived, bargained-for and agreed-upon language mutually determined by the Settling Parties to express their intentions in entering into this Agreement. Any ambiguity or uncertainty in this Agreement shall equally be deemed to be caused by, or attributable to, all the Settling Parties collectively. In any action or proceeding to enforce or interpret this Agreement, this Agreement shall be construed in a neutral manner, without regard to any presumption or rule requiring construction against any of the Settling Parties who drafted or caused the drafting of this Agreement.

23. **Integrated Agreement.** The foregoing constitutes the final and entire agreement of the Settling Parties, and supersedes all prior negotiations, representations, understandings and agreements between the Settling Parties. There are no inducements, promises, representations, understandings, arrangements or agreements, either written or oral, between or among the Settling Parties relating to the subject matter of this Agreement which are not fully expressed herein.

24. **Authority to Execute.** The person(s) executing this Agreement represents and warrants that he or she is competent and duly authorized to execute this Agreement and accomplish the assignments set forth herein.

25. **Obligations Survive Release.** All covenants, agreements, representations, and warranties set forth in this Agreement shall survive the execution and delivery of this Agreement.

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26. **Effective Date.** This Agreement shall be effective from and after its full execution by each of the Settling Parties.

Dated: April 23, 2019

Clackamas Construction, Inc.

By: Bobbie Mohler
(Signature)

Bobbie Mohler, Contract Adm/Asst P.M
(Name and Position)

Dated: April 26, 2019

City of Newport, Oregon

By: Spencer R. Nickel
(Signature)

Spencer R. Nickel, City Manager
(Name and Position)

Approved as to Form

[Signature]
City Attorney